

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,)
Plaintiff,) CASE NO. CR11-70RAJ
v.) SEATTLE, WASHINGTON
ROMAN SELEZNEV,) October 16, 2015
Defendant.) MOTION TO POSTPONE
) FARETTA HEARING
)

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: NORMAN BARBOSA
SETH WILKINSON
ASSISTANT UNITED STATES ATTORNEYS

For the Defendant: ANDREA OSTROVSKY
ANGELO CALFO
CALFO HARRIGAN FAKES

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1 October 16, 2015

11:00 a.m.

2 PROCEEDINGS

3 THE CLERK: We are here in the matter of the United
4 States v. Roman Seleznev, Cause No. CR11-70, assigned to this
5 court.

6 Counsel, please make your appearances for the record.

7 MR. BARBOSA: Good morning, Your Honor. Norman
8 Barbosa and Seth Wilkinson on behalf of the United States.

9 THE COURT: Good morning.

10 MS. OSTROVSKY: Good morning, Your Honor. Andrea
11 Ostrovsky and Angelo Calfo here for Roman Seleznev. Linda
12 Noble is interpreting.13 THE COURT: All right. Good morning, all of you.
14 Thank you for being here.

15 Do we have just one interpreter?

16 MS. OSTROVSKY: Yes.

17 THE COURT: Okay. I'll let the interpreter know that
18 sometimes in expanded hearings, we have two interpreters. If
19 at any point in time you need a break or just an opportunity
20 for people to slow down, or request anyone to slow down, or
21 maybe just to have a breather, just let the court know. Just
22 raise your hand. You won't interrupt the proceedings, but I
23 want to make sure that you have the capacity to fully
24 interpret what it is that's taking place. Is that agreed?

25 THE INTERPRETER: Thank you, Your Honor. And just

1 for the record, the interpreter wanted to note that the
2 headphones don't seem to work in this particular instance.
3 There is a hearing issue, and so it requires that the
4 interpreter speak directly into the right ear, which means
5 turning away from the court. So I just ask all the parties
6 to be aware that I can't necessarily look, and I will ask
7 people to speak reasonably slowly and clearly so that I can
8 adequately interpret everything.

9 THE COURT: Yes, of course. Thank you.

10 We're here to address the motion of the defendant on the
11 request for a *Farett*a hearing. But since the parties are all
12 here, I want to get one matter out of the way. I've already
13 indicated to counsel that I'm not going to permit oral
14 argument on the defendant's motion for order prohibiting the
15 prosecution team from obtaining and using BOP telephone
16 records for use in prosecution. The court is denying that
17 motion. The court believes that there is no legal basis to
18 support the motion. I'm satisfied that the Ninth Circuit has
19 upheld as proper that review by prosecution teams to monitor
20 phone calls.

21 The law is also clear that the defendant had no reasonable
22 expectation of privacy in his monitored communications, and
23 no recognized privilege applies to his communication with his
24 family and friends.

25 The court is also satisfied that there's no indication

1 that's been presented by the defense to suggest the
2 defendant's ability to communicate with counsel has been
3 compromised or that his ability to communicate with counsel
4 in preparation for his case has been infringed in any way.

5 Absent such a showing, the court finds that there is no
6 basis to support the motion, and the motion is denied without
7 further argument.

8 Now, the defendant has filed a request for the opportunity
9 to represent himself for pretrial motions.

10 Mr. Seleznev, I want to make sure you understand that what
11 you presented to the court is labeled a *Farettta* hearing. A
12 *Farettta* hearing is essentially the United States Supreme
13 Court decision that requires the court to conduct a hearing
14 to assess whether the defendant's desire to waive counsel and
15 represent himself is knowing and voluntary.

16 Now, I'm going to ask you several questions, because
17 that's the way the hearing works. It's primarily
18 communication between the court and the defendant, to make
19 sure that you understand what you're doing, that you're
20 making an intelligent decision, and that you actually wish to
21 represent yourself for pretrial matters.

22 So to begin, I'm going to have you placed under oath.
23 Please raise your right hand to be placed under oath.

24 MS. OSTROVSKY: Your Honor, if I could, I'd actually
25 like to say something to the court before the court starts.

1 THE COURT: Absolutely, counsel.

2 MS. OSTROVSKY: Thank you, Your Honor.

3 Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. OSTROVSKY: An issue has arisen over the last
6 week or so that we need to bring to the court's attention and
7 which requires us to ask this morning for a continuance of
8 the *Farett*a hearing.

9 Most acutely, Mr. Calfo and I have been at the courthouse
10 for the last hour and 15 minutes to meet with Mr. Seleznev
11 before this hearing. We alerted the marshals three times to
12 the fact that we were here and ready to meet with him. We
13 were given five minutes to meet with him. He's not prepared
14 for the hearing today, and he's asked us to ask for a
15 continuance.

16 But, Your Honor, this is not the first impediment that's
17 been put in our way to communicate with our client. About a
18 week ago, without giving us any warning, the BOP moved
19 Mr. Seleznev down to Sheridan, and we didn't find out that he
20 was moved until he was able to make one attorney phone call
21 from Oregon.

22 Sheridan is about five hours away from here. This makes
23 it incredibly difficult for us to meet with Mr. Seleznev.
24 Even speaking on the phone with him, our conversations are
25 very limited and can't be substantive because his ability to

1 speak in English -- he's not a native English speaker. We
2 need a translator to be able to interpret substantive
3 conversations with him.

4 I brought this to the prosecutors' attention, Your Honor.
5 A few days later, the next thing we knew, he was back at
6 SeaTac. He's been held in the solitary housing unit since
7 he's been returned to SeaTac, which means he cannot email me
8 to let me know what's going on, he has to ask for permission
9 to be able to call an attorney, and then it's at the
10 discretion of the guard when he can make that phone call. He
11 cannot make any personal phone calls.

12 And I understand that Your Honor denied our motion, but I
13 think Your Honor understands that Mr. Seleznev has a very
14 close relationship with his father. He speaks with his
15 father about his strategy in this case, and he hasn't been
16 able to have contact with his father whatsoever.

17 My understanding from the government is that they do not
18 know where Mr. Seleznev will go after today's hearing. They
19 do not know -- at least the last time I spoke with the
20 prosecutors, they did not know if he would remain at SeaTac,
21 or if he'll go somewhere else.

22 Your Honor, if he is moved away from SeaTac, we have very
23 limited ability to be able to communicate with him
24 effectively and prepare for the upcoming hearings, go through
25 discovery, prepare for trial.

1 In addition, just the erratic shifting and moving him
2 around, in and out of solitary confinement, from one place of
3 incarceration to another, those transition periods make it
4 very difficult for an inmate to communicate with counsel.
5 He's, you know, in vans for long periods of time. He can't
6 talk with us. It is making it very difficult for us to be
7 able to consistently and effectively communicate with
8 Mr. Seleznev.

9 And because he's been moved around, because he hasn't had
10 good access to us, because we weren't able to speak with him
11 this morning, we'd ask that Your Honor continue today's
12 hearing.

13 We'd also ask that Your Honor continue the upcoming
14 Pretrial Motions I deadline. The reason for that is that
15 Mr. Seleznev's motion in paper is that he be able to file
16 pretrial motions on his own, and the first pretrial motions
17 deadline is October 26th. So I think the court needs to be
18 able to rule, make a *Farett*a ruling before that first
19 deadline so as not to prejudice the defendant's Sixth
20 Amendment right to be able to represent himself at that stage
21 of the proceedings, if that is what he decides he wants to
22 do.

23 One more thing, Your Honor: The court has been alerted to
24 the fact that the government believes it has information
25 that's discoverable that is classified. They've notified the

1 court that they'd like the court to appoint a classified
2 information security officer. We have already been in
3 contact with Mr. Slade and understand from him that this
4 process of getting security clearances could take a number of
5 months.

6 So there is just a few things that are coming up that we
7 think may require additional time to be able to prepare for
8 trial, not the least of which is the access to counsel
9 issues.

10 So we would ask the court to continue today's hearing,
11 continue the Pretrial Motions I deadline, suspend the current
12 case schedule, and set a status conference fairly soon, Your
13 Honor, so that we can evaluate what's going on with
14 Mr. Seleznev's housing situation, and we may, at that point,
15 ask the court for a new scheduling order.

16 THE COURT: Let me ask you a question, counsel. Is
17 there some reason why, as soon as you started to experience
18 difficulty in terms of your client's housing, that you didn't
19 let the court know right away? The court scheduled this
20 hearing for an hour, and to be honest with you, I have a very
21 congested calendar, and I certainly could have added another
22 proceeding to take place and take some of the pressure off
23 the back end of the court's calendar. When you do it as
24 you're doing it, that means the court is going to waste the
25 next hour-plus because of your inability to bring this to the

1 court's attention earlier.

2 MS. OSTROVSKY: I apologize, Your Honor, and I will
3 absolutely, in the future, next time alert the court right
4 away. I did alert the prosecutors and -- but next time I
5 will alert the court. And I sincerely apologize for the
6 inconvenience to the court.

7 THE COURT: And, counsel, part of what you're
8 bringing to the court's attention deals with FDC activities,
9 as opposed to the government's controls. Now, my
10 understanding is the government doesn't have any control
11 whatsoever as to where the defendant is housed or his
12 transfer or relocation, or where he's actually positioned at
13 the detention center. I don't think you have any reason to
14 disagree with that, correct?

15 MS. OSTROVSKY: Well, I don't think that the
16 prosecutors control the BOP, Your Honor. I do think that if
17 the prosecutors communicate to the BOP that they are
18 concerned that the BOP's actions are infringing on
19 Mr. Seleznev's Sixth Amendment rights, I think that the BOP
20 listens.

21 THE COURT: Well, the concern I have, counsel, is
22 that if you're going to raise these types of issues about
23 what's taking place at the Federal Detention Center, the
24 Federal Detention Center has their own set of lawyers.
25 They're not here today. I don't see anyone in the audience,

1 and certainly nobody is standing up now.

2 MR. BARBOSA: We actually do have an attorney, just
3 for the court's knowledge, from BOP, because we wanted to be
4 prepared to address the phone calls issue. We had not
5 discussed this current issue. But there is somebody
6 available if you have questions, Your Honor.

7 THE COURT: Okay. Thank you.

8 Counsel, please continue.

9 MS. OSTROVSKY: That's the end of my argument, Your
10 Honor.

11 THE COURT: All right. I'll hear from counsel for
12 the government.

13 MR. BARBOSA: Your Honor, as you've seen, the BOP
14 does have some serious security concerns in this case, and
15 they have been handling Mr. Seleznev very carefully.

16 He was moved last week. As soon as we learned about that,
17 we began communicating with the BOP about the reasons for it.
18 They did have some new security concerns last week that
19 turned out to be unsubstantiated. They moved him back to the
20 FDC, I believe as early as Monday or, at the latest, Tuesday.

21 We have been coordinating closely with the marshals and
22 the BOP to make sure that Mr. Seleznev does have access to
23 counsel, despite the added security precautions that the BOP
24 has implemented, which have, at times, included him being in
25 the SHU. He has not been permanently in the SHU. He's been

1 in a variety of different units. But, for example, when
2 placed in the SHU, at one point he did not have contact
3 visits with counsel. We've worked on that with the marshals.
4 Mr. Wilkinson and I met personally with the warden to address
5 the concern that he needed to have contact visits, and
6 they've worked with us and have been very responsive to make
7 sure that Mr. Seleznev had adequate access to counsel. Even
8 last weekend, when he was briefly moved to Sheridan, when
9 they did contact us and informed us of this, they let us know
10 that he did have access to an attorney phone, an unmonitored
11 attorney phone so he could communicate with counsel.

12 There's no question that an inmate in custody has more
13 difficulty communicating with his counsel than somebody who
14 is not in custody, but the BOP is responsive and they are
15 working with us, and they are doing everything they can.

16 As far as this morning's situation, I just learned about
17 that as we walked in for this hearing. We are available
18 later. It sounds like the court may not be. But we're happy
19 to allow counsel to have that hour to talk to their client,
20 if there is a way to fit it into the court's schedule. So
21 we'll make ourselves available. If it can't be done today,
22 we already have -- we have some time available next Friday
23 morning, also.

24 THE COURT: The court is not available, counsel, from
25 Wednesday through Friday.

1 Counsel, if you could address one of the other concerns
2 that counsel had, and she represented that when they had made
3 attempts to contact their client when he was at Sheridan,
4 that they had one call, is what counsel represented, or very
5 limited opportunity to talk to their client, and it was also
6 up to the discretion of the on-duty officer to decide if the
7 defendant could even have access to counsel in the first
8 place to make the call.

9 MR. BARBOSA: Yes. I understand the procedures in
10 the BOP, and I believe this is the same as the FDC, are that
11 when a defendant wants to make a call to their attorney, they
12 have to request permission from their unit manager to make
13 the call, and then the unit manager goes about arranging the
14 call. It may take an hour or two. It may take some time to
15 arrange it. But it's not an immediate -- they don't have a
16 phone, for example, in their cell, where they can make a
17 call. But that is the standard procedure. All the other
18 inmates at the FDC are subject to the same circumstances.

19 When he's in the SHU, he also has the ability to
20 request -- set up a phone call. BOP informed me that he had
21 two phone calls the day he arrived at Sheridan, with counsel.
22 I don't know if they have their information right. But they
23 do have procedures in place, and they're acting under the
24 same procedures as every other inmate.

25 THE COURT: Is there any reason why the defendant, if

1 the circumstances presented themselves, that would warrant
2 his relocation or transfer to a different facility, that
3 there can't be some communication with defense counsel so
4 that they're not surprised or shocked or amazed by the fact
5 that their client is not in the location where they thought
6 they could contact him?

7 MR. BARBOSA: That -- first, my understanding as of
8 today is that the BOP and the marshals have no current plans
9 to move Mr. Seleznev from the FDC. Circumstances can,
10 obviously, change, but that was a highly unusual
11 circumstance.

12 In terms of informing counsel in advance of a move, that
13 is something that the BOP and marshals would be extremely
14 adverse to. That's a serious security concern in terms of
15 allowing others to know when he may be transported. So they
16 would be opposed to that.

17 THE COURT: Is there any reason why they can't call
18 immediately upon transfer?

19 MR. BARBOSA: No. And they did call us, and we began
20 contacting counsel as soon as we learned of it last Friday.
21 We had some email communication issues. We didn't get that
22 notice to them for several hours, maybe five to six hours
23 after we learned. But once he was there, we learned, and we
24 began communicating it to counsel. And once he was back, as
25 soon as we learned, we communicated that to counsel.

1 THE COURT: All right. Thank you, counsel. Anything
2 further?

3 MR. BARBOSA: No, Your Honor.

4 THE COURT: All right. Counsel?

5 MS. OSTROVSKY: Just two quick points, Your Honor.

6 And, again, I apologize for the inconvenience to the court,
7 but it's been my experience that I'm able to meet with my
8 client before a hearing, such as this one, for at least 20 to
9 30 minutes. We were not planning on not being able to meet
10 with our client this morning, so...

11 The other -- just -- I just want to reiterate that our
12 client doesn't speak great English, so having access to the
13 phone while he's in the SHU, yes, my understanding is he can
14 make a request, and when the BOP finds it appropriate, he can
15 make a call, but I'm not allowed to get an interpreter on the
16 line, and so it's very difficult to have a substantive
17 conversation with him.

18 And, you know, what I heard is that there is no current
19 plans to move Mr. Seleznev from SeaTac, but that isn't -- I'm
20 not feeling very reassured, Your Honor, given what's happened
21 over the last week, and just emphasizing again, it's just
22 making it very difficult. This erratic moving around into
23 different units, in the SHU, down to Sheridan, it's making it
24 very difficult for us to communicate effectively with
25 Mr. Seleznev.

1 THE COURT: Counsel, I don't have a crystal ball to
2 be able to tell you what's taking place or what's going to
3 take place down the road as to why that transport was
4 necessitated. I don't have any information at this point in
5 time.

6 The other concern I have is, when you say you wanted to
7 meet with your client this morning to prepare him for his
8 *Farettta* hearing, counsel, he filed his motion on August 26th,
9 so there's been a considerable amount of time from the time
10 he filed this motion, that you clearly had to be on notice
11 that he filed the motion, and you clearly had to be on notice
12 that the hearing was going to take place today, and yet you
13 say today that you waited until ten o'clock today to talk to
14 your client in preparation for the hearing. Is there some
15 reason for that extended delay in preparing for the hearing
16 today?

17 MS. OSTROVSKY: Your Honor, I did not say that I
18 waited until this morning to talk to my client about the
19 *Farettta* process or the *Farettta* hearing.

20 I met with my client earlier this week at the FDC. I've
21 met with him numerous times between the time that he filed
22 that motion and today. But when I met with him earlier this
23 week, he and I discussed the fact that we would be able to
24 talk again this morning, and we weren't able to do that.

25 THE COURT: All right. Thank you, counsel.

1 Let me get my calendar. I'll be right back.

2 (COURT IN RECESS.)

3 THE COURT: Counsel for the defense, the court has
4 made its decision. I'm going to grant a continuance only
5 because the court can't accommodate any changes in today's
6 schedule. We have a full sentencing calendar this afternoon,
7 and I'm not going to alter someone's expectation that they
8 had reason to believe they were going to be sentenced today,
9 to have to postpone them because of the circumstances that
10 you presented to this court. It's not fair to them, and it's
11 certainly not fair to this court.

12 The other concern I have, counsel, about postponing this
13 proceeding is -- and I'm not saying it's accurate,
14 inaccurate, I'm not putting any weight as to the
15 communications that the government has provided to this court
16 by way of the recorded conversations, but it's a clear
17 suggestion to this court from what's reflected in those
18 communications that delay as a strategy is being considered
19 or discussed quite frequently during the course of those
20 communications.

21 This court expects that when we set deadlines, those
22 deadlines are adhered to. This court expects this case to
23 proceed just like any other case would proceed, in a fair and
24 expeditious manner, giving the parties the opportunity to
25 properly prepare their case without unnecessary delay.

1 So, again, I'm not confirming the accuracy or inaccuracy
2 of those recordings or putting any weight one way or the
3 other, but I want to send a clear statement to you and to
4 your client that unwarranted delays or artificial or
5 fictional reasons for delays will not be tolerated by this
6 court.

7 As an officer of this court, you've represented that you
8 didn't have the opportunity to have this last meeting with
9 your client. I'm not exactly sure what else needed to be
10 done. If you actually met with your client, and I have no
11 reason to not believe that, as you've indicated, but it seems
12 that when you walked into this court today, even if it was
13 five minutes to 11:00, you should have been prepared to go
14 forward with the *Farett*a hearing, and so should your client.

15 But under the record that you've made and under the
16 circumstances that you've provided to this court,
17 particularly with the moving and transfers of the defendant
18 several times, it is for that reason the court gives greatest
19 consideration for postponing.

20 So the date that I have available, counsel, will be
21 October 27th at 9:00 a.m. Let me hear from the government if
22 there is any reason why the government can't be here on
23 October 27th at 9:00 a.m.

24 MR. BARBOSA: We can make that, Your Honor.

25 THE COURT: Counsel for the defense?

1 MS. OSTROVSKY: If I can just check my calendar.

2 THE COURT: Yes.

3 MR. CALFO: Your Honor, October 27th will work. And
4 if I may have just a moment, Your Honor?

5 Your Honor, I just wanted you to know that we heard what
6 you just said loud and clear. I hope the court knows that
7 Ms. Ostrovsky and I have no interest -- never had in our
8 entire law careers to ask the court to delay a proceeding for
9 some inappropriate reason that our client may have concocted.
10 We're not going to do that.

11 Those conversations that took place were before we got
12 involved. Our conversations with Mr. Seleznev, I think, have
13 been aimed at making sure that we can do a good job
14 representing him and he understands the options that are
15 available to him.

16 This *Faretta* issue has been a difficult issue for both the
17 client and for us. And one of the reasons we wanted to meet
18 with him this morning is that he still hasn't decided exactly
19 how he's going to approach it. It's been an evolving issue.

20 So I want the court to know we have been diligent.
21 Ms. Ostrovsky and I have both been very diligent in working
22 with Mr. Seleznev on this *Faretta* issue. It's in flux. This
23 is a man who is very vulnerable. He's away from his family.
24 He's facing a lot of time here. He has no one to talk to,
25 other than us and his father, and so it's a very difficult

1 situation. It's not quite as static as you might normally
2 see, Your Honor. So I just wanted you to take those things
3 into consideration.

4 Thank you.

5 THE COURT: I just want to make sure you're clear,
6 counsel, and co-counsel is clear.

7 Both of you have excellent reputations in this court.
8 Both of you have appeared before this court on numerous
9 occasions and have always provided the highest caliber of
10 service and representation to your clients. I don't expect
11 that that's going to change, and the court's opinion of
12 either of you certainly hasn't changed.

13 But under the circumstances of how this was put before
14 this court today, I want to make sure that you and your
15 client have a clear understanding of the court's expectations
16 and what the court will and will not tolerate for the further
17 proceedings.

18 MR. CALFO: And that's understood, Your Honor. We
19 understand. I hope you understand why this happened today.

20 THE COURT: I understand that, counsel.

21 MR. CALFO: Thank you.

22 THE COURT: And, counsel, when you do have
23 communication with your client, I trust -- I don't expect a
24 response -- but I hope that you're emphasizing for him that
25 oftentimes other individuals other than the lawyers -- I'm

1 talking about family, friends, other people housed and
2 incarcerated with him -- will give him advice. Oftentimes
3 that advice -- as a matter of fact, most of the time that
4 advice is false, premised upon false expectations, or lack of
5 an understanding of the process and procedures, but believe
6 that what they're doing would trump the advice provided by
7 counsel. So I hope that your client takes that into
8 consideration, and that you take that under advisement when
9 you communicate with your client of the importance of the
10 communication with you, and not be influenced by other
11 individuals who won't bear the consequences or suffer the
12 consequences of bad decisions being made.

13 MR. CALFO: Thank you, Your Honor.

14 THE COURT: All right. So I set the date and time.

15 Counsel has requested a postponement of the case schedule.
16 I'm not going to do that, counsel, right now. I want to have
17 the *Faretta* hearing. The current case schedule deadline is
18 the 26th of October. I'll put that in abeyance, counsel.
19 I'll put it on hold, and I'll make a final determination of
20 what that may look like as far as a continuation. You can
21 expect a continuation of the case schedule deadline for that
22 particular date, but I don't want to give you a firm or a
23 fixed date until I've made a ruling on the *Faretta* hearing;
24 otherwise, we can be postponing and rescheduling to a
25 different date that doesn't make any sense. We don't have to

1 do that at this point in time. So I'll schedule it later,
2 but just not right now.

3 Anything further from counsel for the defendant?

4 MS. OSTROVSKY: No, Your Honor.

5 THE COURT: Anything further, counsel for the
6 government?

7 MR. BARBOSA: No, Your Honor.

8 THE COURT: All right. We're in recess.

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10 (THE PROCEEDINGS CONCLUDED.)

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C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 6th day of November 2015.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter